

## **Education Provisions in State Constitutions:**

### **A Summary of a Chapter for the State Constitutions for the Twenty-First Century**

#### **Project**

**By**

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Education is undeniably one of our most important public functions and the most important function of state governments, which have primary responsibility for it. From the earliest days of the republic, some state constitutions have singled out education, sometimes alone among the many important public services provided by state government, as worthy of special recognition. Today, every state constitution contains an education provision.

This chapter draws on the long and important history and pervasiveness of education provisions in state constitutions, to explore:

- How these provisions evolved over time
- The extent to which they seem adequate or appropriate to meet current needs
- Whether there are recognized “best practices” in existing state constitutional education provisions or in the literature
- How one might approach the task of developing “model” education provisions for a state constitution

#### **An historical overview**

The evolution of education provisions in state constitutions has not proceeded in a precise stage-by-stage sequence, each separate and clearly identifiable. Rather, the evolutionary landscape is chaotic, characterized by overlapping developments among, and even within, the states. Partly this is because, although states have sometimes mimicked one another’s constitutional provisions, important differences in history, demographics, geography, and political and social orientation have tended to rise to the surface and limit such similarities. One of the most telling differences is the time at which, and the circumstances under which, a state entered the union. As a consequence, important differences persist in state education provisions regarding such central matters as the nature

and extent of the commitment to education, state-local relationships, the structure of state education systems and bureaucracies, and funding mechanisms.

Nonetheless, it may be useful to sketch four broad stages through which education provisions have passed, and a rough approximation of the time period occupied by each of those stages.

1. Introductory stage (1776-1834). This stage reflected a substantial degree of uncertainty about constitutionalization of education with states dividing relatively evenly between those with education clauses and those without them. The initial state constitutional provisions tended to recognize the importance to society of an educated citizenry, either by exhortations about the virtues of learning and knowledge or by charges to state legislatures to establish schools. During the latter part of this introductory period, a number of state constitutional provisions began to impose a more specific obligation on state legislatures-- to provide for a general system of free public education, equally open to all.

2. Foundational stage (1835-1912). This was a period during which the number of states doubled, and most of those entering the union had constitutions with education clauses. Additionally, most of the other states without education provisions in their constitutions added them. This period, clearly the most active one for state education provisions, was dominated by provisions that placed far more explicit responsibility on states and their legislatures regarding the establishment, funding and administration of free common school systems.

3. Quiescent stage (1913-mid-20th century). This was a period of relative quiescence with only limited, sporadic constitutional activity. Mainly, this involved elaboration of the fiscal and administrative structures put in place during the prior stage.

4. Rights stage (mid-20<sup>th</sup> century-present). Although this stage has involved continuing modifications of the prior stages' fiscal and administrative structures for education, it is more notable for its responses to legal or other advocacy efforts of the period, beginning with the desegregation efforts of *Brown v. Board of Education* and extending to the funding equity and educational adequacy litigation of the past 30 years. Many of the education provisions of this period reflect acceptance of the premise that state education clauses afford students enforceable rights and seek to define, or to extend or narrow, those rights.

### **Adequacy or Appropriateness of Education Provisions to Meet Current Needs**

To try to provide a definitive assessment of whether education provisions of state constitutions, generally or in individual cases, adequately and appropriately meet current needs is beyond the scope of the chapter. It implicates fundamental questions of constitutionalism and one's view of the proper role of the various branches of government. It also is confounded by the extent to which education provisions can fairly be given credit for educational success or blame for educational failure in a particular state or locale.

Depending upon one's view, the extraordinary body of state court litigation over the past 30 years, still developing at a substantial pace, that deals with interacting issues of educational equity, access and quality, is either a sign that state education provisions are admirably serving their purposes, or that they have led us badly astray. What is indisputable, though, is that the education funding systems, and perhaps also the education structures, of the 19<sup>th</sup> and early 20<sup>th</sup> centuries are inadequate to meet late 20<sup>th</sup> and early 21<sup>st</sup> century educational needs and expectations.

### **Identifying “Best Practices” in Existing State Education Provisions or the Literature**

There are five primary sources of “best practices:” (1) evaluations of existing state education provisions in the literature; (2) judicial decisions construing education provisions; (3) model state constitutions; (4) state claims about their own education provisions; and (5) state amendatory practices.

The first two sources are inter-related because the leading commentators have tended to evaluate state education clauses in terms of their relative “strength,” or their utility in producing a particular kind of state educational system, and an increasingly important benchmark is how courts have construed the clauses. Because education has been so consistently rated the most important public service provided by state governments, it is tempting to conclude that “best practices” would be represented by the “strongest” education provisions, as identified by the commentators. However, that assumption is questionable, largely because there is growing agreement that the categorization has failed to meet a basic pragmatic test—strong provisions have not correlated with strong public education systems or with strong judicial rulings in support of educational rights. For example, the education clauses in the two states generally considered to have the boldest judicial rulings in favor of students' educational rights—Kentucky and New Jersey—have been categorized as among the “weakest” clauses.

That does not mean, however, that the large and growing body of education clause litigation is devoid of “best practices” lessons. As with all best practices, though, the lesson to be learned is closely related to the constitutional drafter’s goals. If, for example, a goal is to minimize the prospects of lengthy, contentious and costly litigation, certain judicial interpretations of state education clauses will be the focus. If, conversely, the goal is to assure that a particular kind or quality of education is provided, or a particular set of educational outcomes is achieved, then other judicial decisions may suggest what constitutes “best practices.”

Another possible source of “best practices” in education provisions is model state constitutions. However, the public education provision of the best-known model constitution, the one published by the National Municipal League in 1921 and last revised in 1968, is hardly path breaking. Drawing heavily on existing state constitutional provisions, it requires the legislature to “provide for the maintenance and support of a system of free public schools open to all children in the state,” and authorizes, but does not require, the legislature to “establish, organize and support such other public educational institutions, including public institutions of higher learning, as may be desirable.”

Since this “model” clause has not been updated to reflect the educational upheavals of the past 35 years, including the unprecedented equity/adequacy litigation, it is difficult to know whether even its drafters would still consider it a model. Perhaps they might, if they subscribe to the “constitution for the ages” view, preferring broadness and generality to temporal specificity.

A more recent model state constitution, produced by the Campaign for Responsible Government in 1998, includes much more expansive education provisions. They include a hortatory preamble, two qualitative descriptors of the state’s “system of public schools” (“general and uniform,” and “thorough and efficient”), a requirement that the legislature make provision “by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state,” a guarantee of permanent school and university funds, and a prohibition against aid to sectarian schools.

Like the National Municipal League model provisions, these education provisions are derived from existing constitutions. Unlike the League model, though, they suffer from their elaborateness. For example, viewed through the prism of equity/adequacy litigation, it is hard to know how a court might construe its two sets of qualitative descriptors, in terms of their meanings or their relationship to one another. A legislature seeking to implement this clause might have similar problems.

Two even more recent surveys of state education clauses, though not formulated as model constitutional provisions, provide useful check lists for the creation of a model. The first, produced in conjunction with the Hamilton Fish Institute, lists elements such as: a preamble and statement of purpose, guarantee of free and public schools, specifying types of schools, scope of education and age requirements; reference to funding, including requirements related to uniformity, equity, and source; statement of non-sectarian control; establishment of the right to education and to a safe and secure educational environment; and a statement of non-discrimination.

In its updated survey of State Constitutions and Public Education Governance, the Education Commission of the States listed four common elements that appear in state education provisions, largely overlapping those listed by the Hamilton Fish Institute: establishing and maintaining a free system of public schools open to all children of the state; financing schools; separating church and state, often in at least one of two ways--forbidding any public funds to be appropriated or used for the support of any sectarian school, or requiring public schools to be free from sectarian control; and creating certain decision-making entities (*e.g.*, state board and superintendent of education, and local board and superintendent of education) but usually not specifying their qualifications, powers and duties.

The other possible sources of “best practices” include what the states say about their education provisions or their constitutions generally (admittedly a rather self-serving source), and what the states’ most recent practices have been regarding constitutional amendments. Among the states that have claimed their education provisions represent “best practices” are Montana and Florida.

Montana’s constitution is relatively recent, having been adopted by a constitutional convention and ratified by the people in 1972, and its education provisions are expansive, occupying 10 sections of an article entitled “Education and Public Lands.” The first and main section, entitled “Educational goals and duties,” has a few elements reminiscent of other state constitutions, but a number of unique attributes. It begins with an unusually ambitious goal—“to establish a system of education which will develop the full educational potential of each person”—and adds for each person a guarantee of equality of educational opportunity. However, in the more operational third paragraph of this section, the scope of the state’s educational mission seems to have been curtailed, or at least made more ambiguous. The legislature is required to “provide a **basic** system of free **quality** public elementary and secondary schools,” and is authorized to provide other educational institutions and programs.

The legislature also is required to “fund and distribute in an **equitable** manner to the school districts the state’s share of the cost of the **basic** elementary and secondary school system.”

Florida’s claim to being a “best practices” state is based on its seven recent education amendments. Four were adopted in 1998 as a result of a constitutional convention; three were adopted in 2002 as a result of initiative petitions. One of the 1998 amendments and two of the 2002 amendments are serious candidates for “best practices.” Prior to the 1998 amendment, Florida’s education provision was limited and similar to many 19<sup>th</sup> century education clauses, committing the state to make “[a]dequate provision...for a uniform system of free public schools.” The amendment added several important, and seemingly ambitious, elements. First, it added two sentences at the beginning of the section that read as follows:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders.

Second, it added to the required attributes of the public education system that it be “efficient, safe, secure and high quality.” Finally, it added that such a system should “allow...students to obtain a high quality education.”

Although this 1998 amendment make very clear the primacy of education to Florida, like one of the model constitutions it may create confusion about the precise extent of the constitutional goal or mandate by combining two possibly inconsistent qualitative standards—in Florida’s case, “adequate” and “high quality.”

Two of Florida’s three 2002 amendments also are noteworthy. The first requires the legislature to make “adequate provision” for (that is to say, fund) reduced class sizes, to be phased in between the 2003 and 2010 school years, in order “[t]o assure that children attending public schools obtain a high quality education.” The second requires the state to provide free, high quality pre-kindergarten learning opportunities for all four-year olds, to be in place by the 2005 school year and to be funded by “new” money.

The final source of possible education clause “best practices” is recent efforts of states, including Florida, to amend their state constitutions. Since 1996, 54 proposed amendments to state education provisions have appeared on ballots in 24 states. Of those, by far the greatest number—36, or 66.7 %—have related to fiscal matters, some quite technical, others far-reaching. Other topics have included higher education governance (five, or 9.4%), elementary and secondary education governance (four, or 7.5%), teaching and instruction

(four, or 7.5%), educational quality (two, or 3.8%), race (two, or 3.8%), and parental authority over their children's education (one, or 1.9%).

Of the 54 amendments proposed, 36 (66.7%), in 18 states, were successful. Twenty-four of those successful amendments (66.7%) dealt with fiscal issues, many in a relatively technical manner. However, some interesting best practices directions emerged. Arkansas and Colorado required minimum tax levies for education; conversely, Missouri and South Dakota capped, or made it more difficult to increase, tax rates. Four states allocated funds from other sources to education—Oklahoma from a tobacco settlement fund, and Georgia, South Carolina and Virginia from state lotteries. Hawaii took a different fiscal direction, authorizing state bonding to assist not-for-profit private schools and universities. Of even greater contemporary relevance, Louisiana authorized the State Board of Elementary and Secondary Education to oversee and even manage an elementary or high school determined to be failing, and to use available state and local funds. Finally, and perhaps most interestingly, Oregon required the legislature to provide sufficient funding to meet state education quality goals and to report publicly whether or not it had been able to do so.

Two successful amendments dealt with racial issues—California's Proposition 209 barring most affirmative action programs and Kentucky's egregiously overdue repeal of a provision requiring segregated schools and permitting poll taxes. Four dealt with university governance issues. The other six amendments dealt with educational quality and K-12 program or administrative issues, and all were adopted in Florida.

We may be able to learn something about "best practices" from unsuccessful constitutional amendments as well. That they commanded enough support to reach the ballot, although not enough to pass, may suggest that they are precursors of future education clause directions. For example, three of the unsuccessful proposals sought to assist non-public schools directly by voucher-style payments (California and Michigan) or indirectly by tax credits (Colorado). A fourth sought to prohibit using property taxes to support public schools (South Dakota). A Colorado proposal provided for the inalienable right of parents to direct and control the upbringing, education, values and discipline of their children. A Nebraska proposal, predating Florida's 1998 amendments, sought to make each of a "quality education," a "fundamental right," and a "thorough and efficient education" a "paramount duty" of the state. An Oregon proposal would have measured a teacher's job performance partly on the extent to which his or her students' appropriate knowledge increased.

## **Developing “Model” Education Provisions for a State Constitution**

This section focuses on two kinds of issues regarding the drafting of state constitutional education provisions--a set of broad, threshold considerations, followed by a much longer and more detailed set of substantive inquiries. In connection with both, models drawn largely from existing state constitutional provisions are cited. The end result is not a single recommended model education clause or set of education provisions; rather, this chapter seeks to offer a series of informed choices about various education elements that might be incorporated into a state constitution by a thoughtful drafter sensitive to local needs and desires.

Six threshold issues are divided into two categories, one relating to the comprehensiveness and specificity of an education clause, and the other to its enforceability. The first category contains three interrelated issues—the ease of amendment, comprehensiveness, and degree of detail or specificity. The second category also raises three interrelated issues--whether the clause is intended: to be mandatory or hortatory; to be self-executing or to require legislative or executive action; and to create individual rights or merely to vest the state with an obligation or discretion.

Beyond these threshold issues, the chapter reviews a comprehensive list of substantive issues to be considered in drafting education provisions (or evaluating existing ones). The list is culled from state constitutions, current and historical, and from secondary sources, as are the illustrative provisions set out for many of the issues.

### **Comprehensiveness and Specificity**

The bottom line about comprehensiveness and specificity, supported by the substantial weight of expert opinion, is that less is more—relatively concise education provisions are preferable to elaborately detailed ones. Put in other, familiar terms, education clauses should be written more for the ages than for the moment. Despite that body of opinion, however, there has been a general historical trend toward more detailed education provisions in state constitutions, and many of the “best practices” states reflect that trend.

### **Enforceability**

Sometimes as a result of their own terms and sometimes as a result of judicial construction, sharp differences have emerged regarding the enforceability of state education provisions. A review of the school funding/educational adequacy litigation of the past 30 years, by far the most comprehensive body of state constitutional education litigation, suggests, however, that in most states courts have found that, at least in appropriate cases,

their education provisions are mandatory, self-executing and enforceable by citizens or their representatives.

#### Possible elements of a “model” state education clause

The full version of this chapter provides a comprehensive list, without discussion, of possible elements that might be included in a state’s constitutional education provisions and then a relatively brief discussion of some of those elements. For the most part, examples and references were left to the endnotes.

Since 10 categories of elements and more than 40 specific items were grouped under those categories, an education clause that incorporated a substantial portion would be long and detailed. Whether that should be the case, obviously, is a threshold question for any drafter.

The comprehensive list includes elements and items drawn from all the “best practices” sources--existing education clauses, model clauses, successful and unsuccessful amendments, and judicial decisions. It extends from the broad and general, such as a statement of the state’s educational purpose or commitment, to the very specific, such as the educational levels or student ages covered. It ranges from descriptions of the educational opportunities and programs required or authorized to the administrative structure for implementing them. It includes an array of possible prohibitions and possible rights relevant to education, and it recognizes the possibility of specifying how those prohibitions and rights might be enforced. It includes a number of input-oriented items, especially regarding the financing of education, as well as some outcome-oriented items, such as student achievement. It extends to the role and responsibility of parents and families in the education of their children.

#### Conclusion

It is tempting to say that a major problem of the past 30 years is that state governments overwhelmingly have sought to use 19<sup>th</sup> century education clauses to deal with 20<sup>th</sup> and 21<sup>st</sup> century education problems, and that it would be preferable to have more current and more responsive provisions available. That presupposes, of course, that clauses work better if they are specifically devised to address contemporary education issues. It exalts specificity over the “constitution for the ages” ideology. It assumes that state constitutions can and will be amended, as necessary, to address new issues or new variations of old issues. It assumes that we have the ability to embody in a constitutional clause workable solutions to complex, multi-faceted educational, and often social, problems. It assumes that those responsible for implementing such constitutional clauses do so fully and effectively, or can be forced to do so if they fail to act of their own volition.

The risks of such an approach are plentiful, however. Constitutions can become cluttered with solutions de jour, and prove more resistant to change than expected. Perhaps we will need to develop the constitutional equivalent of software designed to purge your computer of outmoded old programs. Or, we might discover that specificity is more appealing in principle than in practice, and that specific “solutions” turn out to create more problems than they solve.

Perhaps, after we have gone through the process outlined in this chapter of identifying, consulting and applying education clause “best practices,” we can decide with some confidence how best to proceed. Of two things, however, we can be certain—the future will hold no fewer challenges than the past 200 years and the importance of providing American students with high quality education will continue to be of paramount concern to state and national governments, whether or not they incorporate those words into their state constitutions.